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13 UNITED STATES DISTRICT COURT
14
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 CLAUDIA SANCHEZ, ERIN WALKER
17 and WILLIAM SMITH, as individuals, and
18 on behalf of all others similarly situated,

19 Plaintiffs,

20 v.

21 WELLS FARGO & COMPANY; WELLS
22 FARGO BANK, N.A.; and DOES 1 through
23 125,

24 Defendants.

Civil Case No.: CV-07-5923 WHA

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
LEAVE TO FILE A FIRST
AMENDED COMPLAINT**

Date: May 1, 2008
Time: 8:00 a.m.
Courtroom 9, 19th Floor

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I. INTRODUCTION AND STATEMENT OF ISSUES

Plaintiffs' proposed First Amended Complaint ("FAC") contains three new causes of action, adds two additional plaintiffs (and removes one), creates two new subclasses, and adds numerous additional factual allegations against defendants Wells Fargo Bank, N.A. and Wells Fargo & Company ("Wells Fargo"). Some of these proposed amendments are futile, because they fail to allege plaintiffs' new or amended fraud-based claims with particularity and will therefore be subject to dismissal under Federal Rule of Civil Procedure 9(b) and 12(b)(6). Wells Fargo therefore opposes plaintiffs' motion insofar as it seeks to add causes of action for fraud and negligent misrepresentation and to provide corresponding amendments to plaintiffs' CLRA, UCL, and FAL claims.

Moreover, the proposed amendment of the Complaint, if permitted, will prejudice Wells Fargo, because it contains significant changes that cannot adequately be addressed within the Court's current case schedule. Accordingly, in the event the motion is granted, in whole or in part, Wells Fargo requests that the Court adopt an appropriate extension of existing deadlines and discovery limitations to address the resulting prejudice to Wells Fargo.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint on November 21, 2007. On December 28, 2007, shortly after the Complaint was served, the action was stayed pending the outcome of plaintiff Claudia Sanchez's Motion to Vacate Class Action Judgment in *Smith v. Wells Fargo Bank, N.A.*, GIC 802664 (San Diego Super. Ct.). After Ms. Sanchez's motion was denied, this case was put on active status on February 13, 2008, by stipulation of the parties. The Court held an initial Case Management Conference on February 27, 2008, and issued a scheduling order requiring any motions for leave to amend the pleadings to be filed by March 21, 2008.¹ Wells

¹ In the same scheduling order, the Court required the parties to serve Initial Disclosures by March 21, 2008, to file any class certification motions by July 10, 2008, to complete non-expert discovery and file expert disclosures by October 17, 2008, and to file any dispositive motions by November 20, 2008. The Court set the final pre-trial conference for January 26, 2009, and set trial for February 9, 2009.

1 Fargo filed its Answer on February 29, 2008, and served its first set of discovery requests on
2 plaintiffs on March 7, 2008. Declaration of Margaret G. May ("May Dec.") ¶ 2.

3 Plaintiffs filed their Motion for Leave to File a First Amended Complaint on
4 March 20, 2008.² The next day, on March 21, 2008, both sides served their Initial Disclosures.
5 May Dec. ¶ 4. Plaintiffs' Initial Disclosures identified 63 potential witnesses in this case (in
6 addition to the plaintiffs) who assertedly "have knowledge about the circumstances involving
7 being unfairly assessed multiple overdraft fees by Wells Fargo." May Dec. Ex. 1. However,
8 plaintiffs' disclosures contained no contact or identifying information for any of these
9 individuals beyond their names.³ When Wells Fargo's counsel asked for more complete
10 identifying and contact information, plaintiffs' counsel estimated that they would need 45 to 60
11 days to provide it. May Dec. ¶ 6.

12 **III. ARGUMENT**

13 Federal Rule of Civil Procedure 15(a) provides that leave to amend should be
14 freely granted. However, "leave to amend should not be granted automatically." *Ynclan v.*
15 *Dept. of Air Force*, 943 F.2d 1388, 1391 (5th Cir. 1991). Courts have discretion to deny
16 motions for leave to amend upon a showing of undue prejudice to the non-movant, futility,
17 undue delay, bad faith or dilatory motive by the movant, or repeated failure to cure deficiencies
18 by previous amendments. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Western Shoshone Nat'l*
19 *Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991). Futility and prejudice to the non-moving
20 party are often identified as the most important of these factors. *See, e.g., Eminence Capital,*
21 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *Bonin v. Calderon*, 59 F.3d 815, 845
22 (9th Cir. 1995). Both exist here.

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25 ² On that same day, plaintiffs also served their first round of discovery on Wells Fargo,
26 including interrogatories, document requests, and requests for Rule 30(b)(6) depositions. May
Dec. ¶ 3.

27 ³ Wells Fargo is unable to confirm the identity of any of these witnesses based on their
28 names alone. Without additional information such as addresses or account numbers, Wells
Fargo cannot even verify that they are Wells Fargo customers. May Dec. ¶ 7.

A. Plaintiffs' Motion Should Be Denied Because It Is Futile and Would Prejudice Wells Fargo.

1. Plaintiffs' Fraud-Based Amendments Are Futile Because They Are Not Pled with Particularity and Would Be Subject to Dismissal.

Allowing plaintiffs to add generally pled causes of action for fraud and negligent misrepresentation (as well as corresponding fraud-based amendments to their previously stated causes of action) would be futile, because those claims would be subject to dismissal for failure to plead with particularity. Courts may properly deny leave to amend as futile when the proposed amended pleading would be subject to a motion to dismiss. *Partington v. Bugliosi*, 56 F.3d 1147, 1162 (9th Cir. 1995) (denying leave to amend as futile where proposed amended Complaint failed to state a claim); *Brown Leasing Co. v. Cosmopolitan Bancorp, Inc.*, 42 F.3d 1112, 1116 (7th Cir. 1994) (denial of leave to amend proper where plaintiff could not plead reliance on alleged misrepresentation); *Roth v. Garcia Marquez*, 942 F.2d 617, 628-29 (9th Cir. 1991) (upholding denial of leave to amend for futility where greater specificity of facts would not cure legal deficiencies).⁴

Under Federal Rule of Civil Procedure 9(b), the factual circumstances constituting misrepresentation-based claims – the who, what, when, where, and how – must be pled with particularity, and failure to do so is a basis for dismissal of such claims under Rule 12(b)(6). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003).⁵ Moreover, failure to set forth factual allegations as to each of the other required elements of a

⁴ When faced with a facially inadequate amended pleading, the Court may alternatively permit the amendment and then entertain a motion to dismiss under Rule 12(b). *See Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 157 (N.D. Cal. 2005). Wells Fargo suggests that in this instance the Court, in the interests of efficiency, simply reject the proposed amendment at the threshold.

⁵ Although Rule 9(b) refers specifically to the pleading requirements for fraud claims, it is well established in the Ninth Circuit that misrepresentation-based allegations generally (including those based on false advertising claims) must meet Rule 9(b)'s particularity requirements. *See Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (citing *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999), *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1058 (N.D. Cal. 1991)); *In re Century 21-RE/MAX Real Estate Adver. Claims Litig.*, 882 F. Supp. 915, 927 (C.D. Cal. 1994); *Strigliabotti v. Franklin Res., Inc.*, No. C04-00883, 2005 WL 645529, at *10 (N.D. Cal. Mar. 7, 2005).

misrepresentation claim is also a basis for Rule 12(b)(6) dismissal. *Podiatrist Ass’n, Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003). Conclusory allegations are insufficient to satisfy the pleading requirements of Rule 9(b). *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989).

Plaintiffs allege that (1) Wells Fargo misrepresented the amount of plaintiffs’ “available balances,” and (2) Wells Fargo misrepresented the accuracy of such “available balance” information in marketing materials and customer agreements. Proposed FAC ¶¶ 25-28, 32, 68-69. Neither of these claims is pled with the requisite particularity.

Plaintiffs allege generally that Wells Fargo provides inaccurate “available balance” information on its website, by telephone, by representatives in stores, and at ATMs. Proposed FAC ¶¶ 25-26, 32, 68-69. But no particulars are supplied. For example, plaintiff William Smith alleges that he relied on “available balance” information provided by Wells Fargo, but fails to identify any of the circumstances surrounding Wells Fargo’s communication of this information to him. *See* Proposed FAC ¶ 26. He does not specify where or how he checked his “available balance” (e.g., on the website, by phone, in a store, or at an ATM), when he checked it, or what information was conveyed by Wells Fargo. Similarly, none of the other plaintiffs named in the proposed FAC offer specific factual allegations about the circumstances under which Wells Fargo communicated allegedly misleading information about the amount of their “available balances.” *See* Proposed FAC ¶¶ 15-22, 25-26, 32, 68-69.⁶ Conclusory or incomplete allegations do not meet the particularity requirements of Rule 9(b). *See Moore*, 885 F.2d at 540.

Plaintiffs also complain of purportedly misleading statements about “available balance” information in various Wells Fargo brochures, disclosures, websites, and commercials.

⁶ Plaintiff Tim Fox alleges that he monitored his “available balance” between March 5, 2008, and March 8, 2008, online and through one inquiry at an ATM. Proposed FAC ¶ 17. This is still insufficient to identify the precise “who,” “where” – and especially “when” – of his claims. (The precise timing of the alleged misrepresentation is likely to be particularly important here.) Moreover, he fails entirely to specify *what* his available balance was stated to be or *how* that information was misleading.

Proposed FAC ¶¶ 27(a)-(g), 28, 69. However, nowhere do they allege that any of the four plaintiffs named in the proposed FAC ever saw, read, or heard any such statements.⁷ Nowhere do the plaintiffs allege that Wells Fargo communicated any misrepresentations to them through the advertisements or commercials. Indeed, more fundamentally, there are no allegations in the proposed FAC that any plaintiff ever saw or heard *any* misrepresentation from Wells Fargo contained in any brochure, disclosure, website, or commercial. There are certainly no allegations about the factual details (the who, what, when, where, and how) of any such communication. *See Vess*, 317 F.3d at 1106. Plaintiffs state that the advertisements they describe are “examples.” Proposed FAC ¶ 27. But “examples” of alleged misrepresentations, without any allegations that they were made to plaintiffs by Wells Fargo, do not satisfy the particularity requirement of Rule 9(b). *See Newcal Indus., Inc. v. Ikon Office Solutions, Inc.*, No. C-04-2776-FMS, 2004 WL 3017002, at *7 (N.D. Cal. Dec. 23, 2004).

Because plaintiffs have failed to plead with particularity their misrepresentation-based claims, rendering them subject to dismissal, amendment to include these claims would be futile. The Court should accordingly deny plaintiffs’ motion as presented and direct that plaintiffs submit a revised amended complaint that omits those portions.⁸

2. The Numerous Substantive Changes in the Proposed FAC Will Prejudice Wells Fargo.

Despite plaintiffs’ assurances to the contrary, the proposed FAC contains numerous significant changes and additions. For example, the proposed FAC would add two new plaintiffs, Veronica Gutierrez and Tim Fox.⁹ Plaintiffs seek to add three new causes of

⁷ Nor does the proposed FAC allege that any plaintiff relied on any such advertisement, also a required element of these causes of action. *See In re Turbodyne Tech., Inc. Sec. Litig.*, No. CV99-00697, 2000 WL 33961193, at *12-14 (C.D. Cal. Mar. 15, 2000).

⁸ Alternatively, should the Court be inclined to permit plaintiffs another attempt at pleading these claims, it should set a schedule for them to do so and adjust the rest of the case schedule accordingly.

⁹ The proposed FAC omits any mention of the former lead plaintiff, Claudia Sanchez, but the motion fails to address the status of her claim. Wells Fargo requests that, if leave to amend is granted, it be conditioned upon the dismissal of Ms. Sanchez’s claims with prejudice. *Cf.* Fed. R. Civ. P. 21 (permitting dropping of a party “on just terms”).

1 action, for fraud, negligent misrepresentation, and conversion; and to create two new subclasses,
 2 a “Sufficient Funds” subclass and an “Inaccurate Balance” subclass. And plaintiffs have offered
 3 new factual allegations relating to their new claims, subclasses, and the addition of the new
 4 plaintiffs. (Although plaintiffs’ motion does not provide a redline comparison of the proposed
 5 FAC and the original Complaint, it appears that seven out of the fifteen paragraphs in the
 6 Factual Allegations section of the proposed FAC are new or different.) In short, plaintiffs have
 7 not merely “realleged” the originally pled facts with more specificity, but have pled entirely new
 8 factual allegations and theories.¹⁰

9 Wells Fargo acknowledges that leave to amend a complaint is freely granted and
 10 does not suggest a substantive basis for denying proposed amendments other than the
 11 insufficiently pled claims addressed above. But under the current schedule, these significant
 12 amendments, if permitted, would unduly prejudice Wells Fargo by requiring it to evaluate and
 13 investigate substantial new factual allegations after the deadline for serving Initial Disclosures
 14 has passed and after Wells Fargo has served its first set of discovery requests. *See Ascon*
 15 *Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989) (“To put Mobil ‘through
 16 the time and expense of continued litigation on a new theory, with the possibility of additional
 17 discovery,’ would cause undue prejudice.”). This task would be particularly onerous in light of
 18 plaintiffs’ disclosure of 63 potential witnesses whose full identities are still not known.¹¹

21 ¹⁰ *T.C. Jefferson v. Chase Home Finance*, 2007 WL 4374410, at *4-7 (N.D. Cal. Dec. 14,
 22 2007), cited by plaintiffs, does not compel amendment in this case. The court in *T.C. Jefferson*
 23 construed new facts submitted by the plaintiff in opposition to a motion for summary judgment
 as a motion to amend. However, there the amendment was to add an additional factual
 24 allegation of misrepresentation when the misrepresentation claim had already been adequately
 25 pled. *Id.* at *7.

26 ¹¹ The two new plaintiffs named in the proposed FAC have agreed to respond to Wells
 27 Fargo’s first set of discovery requests (which were served before Wells Fargo received either
 28 the motion to amend or plaintiffs’ initial disclosures) on the same timetable as the original
 plaintiffs. May Dec. ¶ 5. However, this concession falls far short of addressing the burden
 Wells Fargo faces to complete relevant discovery on the new causes of action and factual
 allegations in the time allowed by the current schedule. Notably, plaintiffs have sought (and, as
 a matter of mutual professional courtesy, have been granted) an extension of time until April 24,
 2008, to respond to any of these discovery requests. May Dec. ¶ 6.

Moreover, if plaintiffs' motion is granted, Wells Fargo will need to file a motion to dismiss addressing plaintiffs' failure to plead their fraud-based claims with particularity, as addressed above. Such a motion would likely not be set for hearing until mid- to late June. Under the Court's current schedule, therefore, Wells Fargo would be compelled to do most of the preparation for its response to plaintiffs' class certification motion (due July 10, 2008) before the pleadings in this case have been definitely set. Wells Fargo will be prejudiced by the amendment if it is forced to complete most of this preparation before knowing the contours of the operative complaint and having a meaningful opportunity to conduct class-related discovery. *Cf. Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007) (defendant entitled to fair notice of claim and grounds on which it rests); *Moore*, 885 F.2d at 540 (claims of fraud or mistake must be pled with adequate particularity so a defendant can prepare its defense).

B. If Plaintiffs' Motion Is Granted, Either in Whole or in Part, the Court Should Provide for an Extension of the Schedule and Discovery Limits.

If the Court grants plaintiffs' motion, it should condition the amendment on extending existing deadlines and discovery limits so as to address the prejudice to Wells Fargo.¹² Courts have discretion to impose appropriate conditions on leave to amend. *See Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269, 275 (9th Cir. 1965); *Collaboration Prop. Inc. v. Tandberg ASA*, No. C-05-01940-MHP, 2006 WL 2398763, at *3 (N.D. Cal. June 27, 2006). Such conditions may include extensions of time to respond to the amended pleading, reopening of discovery, and a continuation of the trial date. *See* 6 Wright, Miller & Kane, Federal Practice and Procedure § 1486 (2d ed. 1990 & Supp. 2007); *see also Finlay v. Simonovich*, No. 97-CIV-1455, 1997 WL 746460, at *1-2 (S.D.N.Y. Dec. 2, 1997) (extending discovery deadline so that defendants could sufficiently investigate added claim); *Artman v. Int'l Harvester Co.*, 355 F. Supp. 476, 481 (D. Pa. 1972) ("courts may permit the amendment and grant a continuance if such a continuance would enable the objecting party to prepare and meet the new issue").

¹² Plaintiffs themselves acknowledge that modifications to the schedule may be necessary to avoid prejudice to Wells Fargo. *See* Mot. at 6.

1 If plaintiffs' motion is granted, more time will be needed for Wells Fargo to
 2 complete its investigation of the new allegations (including investigation of the 63 witnesses
 3 identified by plaintiffs the day after filing the motion), to adjust its disclosures as needed, and to
 4 pursue discovery from plaintiffs and third parties based on the newly alleged causes of action
 5 and factual allegations. Wells Fargo will also need time to prepare a motion to dismiss
 6 addressing plaintiffs' failure to plead its misrepresentation-based claims with particularity.
 7 None of these significant tasks will be completed in time to allow Wells Fargo to adequately
 8 prepare to respond to plaintiffs' class certification motion, which is currently due in July.

9 Wells Fargo accordingly asks that, should the Court grant plaintiffs' motion
 10 (either in whole or in part), it extend the existing schedule by an appropriate amount to diminish
 11 the prejudice to Wells Fargo that would otherwise result from the amendment. Wells Fargo
 12 further asks that the discovery limits in Rules 30 and 33 be extended to afford Wells Fargo an
 13 additional 15 depositions and 20 interrogatories to address the new allegations.¹³

14 **IV. CONCLUSION**

15 For the reasons set forth above, the Court should deny Plaintiffs' Motion for
 16 Leave to File a First Amended Complaint. Alternatively, should the motion be granted, in
 17 whole or in part, Wells Fargo requests that the Court further order (a) that the claims of plaintiff
 18 Claudia Sanchez be dismissed with prejudice, (b) that the deadlines in the case be extended by
 19 an appropriate period of time to address the prejudice to Wells Fargo, and (c) that Wells Fargo
 20 be granted the right to take an additional 15 depositions and to propound an additional 20
 21 interrogatories beyond those provided for under the Federal Rules of Civil Procedure.

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 27 ¹³ Wells Fargo reserves the right to seek a further extension of the limit on depositions
 28 depending on what it learns in the coming weeks about the 63 largely unidentified witnesses
 listed in plaintiffs' Initial Disclosures.

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2 DATED: April 10, 2008

COVINGTON & BURLING LLP

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4 By: _____/s/
Margaret G. May
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5 WELLS FARGO BANK, N.A. and
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